No. 11,872

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

CONSTANCIO R. ALESNA, JOSE BAGOGO BERNAL, DANIEL RODRIGUES FERREIRA, YUTAKA GOHARA, CORNEL IHA, MASASHI KAGEYAMA, TOROICHI KANDA, FRANK GONSALVES PERREIRA, NOBORU TAKEUCHI, FRED TANIGUCHI and GENKICHI WADA,

Appellants,

vs.

PHILIP L. RICE, as Judge of the Circuit Court for the Fifth Judicial Circuit of the Territory of Hawaii, and WALTER D. ACKERMAN, JR., as Attorney General of the Territory of Hawaii,

Appellees.

Upon Appeal from the United States District Court for the District of Hawaii

APPELLANTS' REPLY BRIEF

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APPELLANTS' REPLY TO BRIEF OF APPELLEES
AND AMICUS CURIAE

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APPELLANTS' REPLY TO BRIEF OF APPELLEES AND AMICUS CURIAE

APPELLEES' THEORY OF APPELLANTS' CASE

Counsel for the Employers Council and the Attorney General have pieced together for appellants a remarkable theory of their case. In their unanimous opinion appellants asked the court for relief against criminal contempt proceedings for violations of a perfectly reasonable, constitutional ex parte restrain-

ing order issued thoughtfully and justly by the appellee judge prohibiting the members of a local union and its officers, an international union,[1] and anybody acting in concert with them at or near the premises of the Lihue Plantation Company in the County of Kauai[2] from mass picketing or assembling or congregating in crowds larger than three at points of "ingress and egress." Appellees point out that at any place away from the scene of the labor dispute where nobody is going in to or coming from the employers' premises, the persons can picket to their hearts content, provided of course they remain ten peripatetic feet apart.[3]

Having thus disposed of the facts, procedurally they urge that a federal court does not have jurisdiction to restrain criminal prosecutions, or if it has jurisdiction, it should not exercise it because the appellants have a perfectly adequate remedy at law because they can stand trial before the appellee judge who after listening to their argument for four hours overruled all their contentions, and reaffirmed his order[4] and then appeal to the Supreme Court of the

[1] 100,000 members throughout the Territory, continental United States and Canada; 5,000 members in Kauai County.

[2] 12,000 acres of land, many miles of company and publicly owned roads and 20 company towns and villages.

[3] This unrestricted right to picket away from the scene of the labor dispute seemed persuasive to the court below. (R. p. 336).

[4] Appellees conveniently omitted from their answer and return the portions of the transcript showing the challenge to the provisions of the ex parte order made before the appellee judge. For example, it was pointed out to the appellee judge in the hearing before him that in the course of giving the employer all the restraints asked for he had restrained the union from "making, uttering or circulating any false deceitful or untrue statements with reference to the Petitioner, its employment practices and its employees work-

Territory which has already ruled against them. But even if all this isn't quite so, they urge that it doesn't make any difference anyway because the Territory has a right to convict appellants for violations of an unlawful restraining order or even an ex parte order which violates the First Amendment.

So far as the procedure in the court below is concerned, they urge that the court was not obliged to give plaintiffs an opportunity to controvert their answer after their motion to strike it was heard and determined. The Attorney General points triumphantly to the fact that appellants' motion to strike was not filed within the twenty day period allowed by the rules which ended on August 10, 1947, but was filed twenty-one days after the answer. Of course this court has judicial knowledge that August 10, 1947 was a Sunday, and that therefore the motion to strike was timely.

The Attorney General also asserts that appellants are in error in stating that an appeal had been taken in the Wirtz case at the time the complaint in this case was filed on January 31, 1947. A written motion and notice of motion for continuance was filed by appellants before the appellee judge, requesting a continuance until final determination of *ILWU v. Wirtz* by this court, and served on the Attorney General. This motion stated that a notice of appeal

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ing therein, or others seeking to work therein" when the company had offered no evidence whatsoever that any statements of any kind, true or false, had been made." On reconsideration, on its own motion, after the extended argument, the court deleted this provision. Except for this the judge found nothing else objectionable about his order.

would be filed in the Wirtz case within 48 hours. The Attorney General opposed this motion at the hearing before the appellee judge on January 27, 1947. A written notice of appeal was filed in the Supreme Court in the Wirtz case on January 29, 1947. This suit was filed on January 31, 1947. Between the filing of the written notice of appeal and the signing of the order of appeal on February 21, 1947, counsel for appellants carried on a series of conferences with the Attorney General to work out a stipulation for summary of exhibits and the summary of exhibits. From the filing of the written motion to continue the hearings, the appellee judge and the Attorney General knew that an appeal in good faith was being prosecuted to this court from the ruling of the Territorial Supreme Court in the Wirtz case. As was stated in the opening brief the Attorney General had agreed that the Wirtz suit would be a test suit, and that it would be unnecessary to file similar proceedings against Judge Rice. Although in non-labor criminal cases, such as the test of the constitutionality of the territorial cattle-thieving statute which was appealed to this court, the appellee judge had stayed all cases while an appeal was prosecuted in one case only, he denied a stay of the criminal indictment against appellees for alleged violations of his order pending the Wirtz appeal.

JURISDICTION

All of appellees' contentions about the jurisdiction of federal courts to hear and determine and grant injunctive relief in a case of the kind and char-

acter here presented have been authoritatively answered by the Supreme Court in *Hague v. CIO,* 307 U.S. 496, 59 S. Ct. 94, *A. F. of L. v. Watson,* 327 U.S. 582, 66 S. Ct. 761, *Douglas v. Jeannette,* 319 U.S. 157, 63 Sup. Ct. 877, *Terrace v. Thompson,* 263 U.S. 197, *Truax v. Raich,* 239 U.S. 33, 36 S. Ct. 7.

In *Screws v. United States,* 325 U.S. 91, 89 L. ed. 1484 the Supreme Court reviewed the whole history of the Civil Rights Acts. That case answers most of the contentions made by the appellees. The court determined that the Civil Rights Act deals with all federal rights and protects them "in lump" against infringement by state officers acting under color of law. It protects against all state officers who under color of law deprive persons of federal rights – the highest state officer to the most lowly is responsible for abuse of power by the state when that abuse infringes on a federal right. The principles of comity do not protect state officers who act in violation of federal rights. The cases dealing with the removal from state to federal courts and the strict showing required in those cases do not control where the allegation is abuse of power by state officers. The Civil rights Act affords civil and criminal relief against. All these questions were disposed of by the *Screws* case.

The Civil Rights Act has been held to abrogate the common law immunity of a judge acting in his judicial capacity. *Picking v. Pennsylvania,* 151 F. 2d. 240. And indeed, this must be so, for if any action by any officer, state or federal, which violates per-

sonal liberties is immunized, there is created a field for the exercise of arbitrary power which our form of government does not countenance. *Yick Wo v. Hopkins,* 118 U.S. 356; *Bell v. Hood,* 327 U.S. 788. In *Ex Parte Virginia,* 100 U.S. 339, a judge was indicted under the criminal counterpart of the section here invoked, and the Supreme Court denied his writ of habeas corpus.

Appellees urge that the so-called comity statute is jurisdictional. That it is not, has long been settled. Thus in *Smith v. Apple,* 264 U.S. 274, 479, 44 S. Ct. 311, 313, 68 L. ed. 678, the Supreme Court said of the section, "In short it goes merely to the question of equity in the particular bill."

In two cases entitled *ILWU, et al. v. Walter D. Ackerman, Jr. et al.,* Civil Nos. 828 and 836, in the Federal District Court for the Territory of Hawaii, a three-judge federal court on April 19, 1948 overruled a motion to dismiss in which the Attorney General made the same contentions as he now makes here. Those cases were brought, as is this case, under the civil rights act. Restraint against prosecutions under criminal statutes of the Territory alleged to be unconstitutional and in violation of the First Amendment was sought against local law enforcement officers who were prosecuting such charges.

The court below has twice overruled appellees' contentions in respect to the jurisdiction of the court to hear and determine the case and to grant the relief prayed. The dismissal of the action by the court below was on the ground that appellants had not in

fact been deprived of rights guaranteed by federal law or the constitution as alleged in the four counts of their complaint.

It is also clear from the opinion of the court below and from the foregoing authorities that plaintiff's complaint is sufficient to withstand a mere motion to dismiss and presents an appropriate case for the exercise of equitable jurisdiction if the appellants have been denied the federal and constitutional rights which they allege.

PROCEDURE

Appellants contend that the lower court erred in granting the motion to dismiss without affording appellants a hearing on their motion to strike a portion of appellees' answer and, after a ruling on that motion, affording appellants an opportunity to controvert the affidavits and other matter contained in the portions of the answer moved to be stricken, and to offer affidavits of their own in respect to the allegations of their complaint.

Appellees state that appellants' motion to strike was not timely. As previously pointed out the twentieth day after the answer fell on Sunday, August 10, 1947, and the motion to strike was filed on Monday, August 11, in compliance with the rules.

Appellees suggest that appellants did not controvert the matter contained in the answer. Under the rules the answer was deemed denied, and certainly appellants were not, in any event, bound to contro-

vert matter which they had moved to strike, prior to a ruling on that motion.

The lower court's action deprived appellants' of due process—that is, an opportunity to be heard on their motion to strike, and an opportunity to be heard in respect to the substance of the answer. The lower court's action was in violation of the Rules of Federal Procedure. Both the old and the new rules contemplate an opportunity to controvert before a motion to dismiss can be given the effect of a motion for summary judgment.

As clearly appears from the record, the portions of the answer which appellants moved to strike summarized in part, and printed in full, according to appellees' whim, the record before the appellee judge in the equity proceeding in the circuit court. Surely appellants were at least entitled to an opportunity to call attention to the missing parts. Surely they could "impeach" the record to this extent.

Appellees cavalierly argue that in any event since appellants contend that the *ex parte* order must be judged on its face, appellants cannot be harmed by any extraneous matter appellees chose to put in the record. They also urge that since the lower court dismissed the action because *as a matter of law,* as well as of fact, appellants were not entitled to relief, that nothing the appellants could have said would have been of any avail. This is a matter which appellants prefer to have an opportunity to test before an impartial court.

Appellants, by the court's ruling on the merits, as

appellees describe it, are twice hung by ex parte employer testimony ex parte employer-adduced affidavit which purport to show that they have forfeited their right to the protection of the Constitution.

VIOLATION OF APPELLANTS' RIGHTS UNDER NORRIS-LAGUARDIA ACT

Count One of appellants' complaint alleges that they have been deprived, by appellees, acting under color of law, of rights guaranteed by the Norris-LaGuardia Act because, by virtue of that Act, the appellee judge was wholly without jurisdiction to issue the ex parte order for contempt of which appellees are prosecuting appellants.

This issue has already been determined adversely to appellants in *ILWU v. Wirtz,* decided by this Court on September 27, 1948. Appellants have petitioned for rehearing and reargument in that case, suggesting that the broader scope of this case may give further enlightenment to the various phases of the question of the application of that Act to the Territory. The court's action on that petition will determine disposition of this count of the complaint, and no point can be served by further argument here. If the court grants that petition, however, appellants respectfully request that the court consider the petition filed in that case as if incorporated in and made a part of this reply brief at this point.

Count Two of appellants' complaint alleged that the appellee judge had no jurisdiction to grant injunctions in labor disputes because exclusive jurisdiction, in strict conformity with the Act, is con-

ferred on the federal district court of the Territory by the Norris-LaGuardia Act. This ground was urged in *ILWU v. Wirtz,* Opening Brief pp. 88-90, but not considered by the court.

There can be no question that Congress has the power to vest exclusive jurisdiction in the federal district court.

To so construe the Norris-LaGuardia Act requires no strained or twisted construction, particularly when it is read as Congress and the Supreme Court has said it must be, in conjunction with, and as an amendment to, the Sherman and Clayton Acts, both of which vest exclusive jurisdiction in the federal district court, and both of which operate on commerce in and within the Territory. To accomplish the purposes of Congress and to make effective the public policy of the United States, surely the substantive rights given by the act must be construed to be as broad as the application of the criminal sanction of these laws, out of the scope of which these substantive rights are withdrawn and legalized. Such a construction obviates any difficulties of construction in respect to appellate procedure and the right to a jury trial in indirect criminal contempt cases.

Count Three of appellants' complaint alleges that they have been deprived, by appellees, acting under color of territorial law, of substantive rights guaranteed to them by the Norris-LaGuardia Act and are being prosecuted for exercising these rights.

Appellants contend that the Norris-LaGuardia Act created federal substantive rights. Congress it-

self said it was legalizing these acts, although it felt that the acts shouldn't need legalizing, but it did so specifically because of judge-made law condemning some of the acts. These acts Congress thought it had legalized in the Clayton Act. Justice Brandeis, Homes and Clarke, dissenting in *Duplex Printing Press Co. v. Deering,* 254 U.S. 443, 41 S. Ct. 172, 65 L. Ed. 349, thought they were legalized:

> This statute (the Clayton Act) was the fruit of unceasing agitation, which extended over more than 20 years and was designed to equalize before the law the position of workingmen and employer as industrial combatants. . . .
>
> By 1914 the ideas of the advocates of legislation had fairly crystallized upon the manner in which the inequality and uncertainty of the law should be removed. It was to be done by expressly legalizing certain acts regardless of the effects produced by them upon other persons. As to them Congress was to extract the element of injuria from the damages thereby inflicted on an employer, instead of leaving judges to determine according to their own economic and social views whether the damage inflicted on an employer in an industrial struggle was damnum absque injuria, because an incident of trade competition, or legal injury, because in their opinion, economically and socially objectionable. This idea was presented to the committees which reported the Clayton Act. The resulting law set out certain acts which had previously been held unlawful, whenever courts had disapproved of the ends for which they were performed; it then declared that, when these acts were committed in the course of an industrial

> dispute, they should not be held to violate any law of the United States. In other words the Clayton Act substituted the opinion of Congress as to the propriety of the purpose for that of differing judges; and thereby it declared that the relations between employers of labor and workingmen were competitive relations, that organized competition was not harmful and that it justified injuries necessarily inflicted in its course. . . .

But the majority of the court disagreed. Congress, in the Norris-LaGuardia Act, legislatively overruled the majority and wrote the dissenting opinions of Justice Brandeis into law. .

The legislative history of the act shows that both the drafters of the law and the House and Senate intended to legalize as substantive rights the conduct made unenjoinable. Congress legalized these acts because they believed they should never have been held illegal, either under vague doctrines of the common law or under the Sherman Act, or the Clayton Act.

The primary objective of the Act, as stated by the Senate Committee, and as stated many times during the debates was "to protect labor in the lawful and effective exercise of its conceded rights—to protect, first, the right of free association and, second, the right to advance the lawful objections of the association."[5] Congress made it clear that the public policy —and the specifically defined acts are merely specifi-

[5] Senate Reports 72nd Congress, First Session, Vol. 1, Report No. 163, p. 10.

cations of that policy—was positive substantive law. Thus Senator Blaine, a drafter and supporter of the bill and a member of a special sub-committee of the Senate Judiciary committee which considered the legislation and held hearings on it during the 70th, the 71st and the 72nd Congress, stated in the debates in the Senate,

> When a declaration of public policy goes to the extent of declaring substantive law, then it ceases to be a mere declaration of public policy, but is the enactment of positive substantive law.[6]

Both the Senate and House Reports on the Bill state that the declaration of public policy was drawn in the language of the Railway Labor Act which the Supreme Court had upheld and enforced in equity in *Texas and New Orleans Railroad Co. vs. Brotherhood of Railroad and Steamship Clerks,* 281 U.S. 584. The Senate report states specifically that the Norris-LaGuardia Act creates the same rights for all employees as was given to railroad employees.

The Railway Labor Act applies to intra-territorial commerce in the Territory and is an exercise by Congress of its plenary power to legislate for the Territory. Under the *Texas and New Orleans* case all employees of railroad carriers in the Territory, as defined in that Act could enforce their substantive rights in equity in the federal court. It is appellants' contention that Congress clearly intended to give the same substantive rights to other employees in the Territory.

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[6] Congressional Record, Vol. 75, Part 5, page 4681.

Senator Norris, in presenting the bill to the Senate, stated:

> Section 5 says that the doing of these acts shall not be held by a court to be a conspiracy. In Section 4 *we already say they are legal* and no injunction shall be issued against anyone, even though there are several of them who have agreed to unite in any one of them.

And after quoting with explanatory comments each of the "legal" provisions of Section 4:

> Is there anybody who objects to any one of those recitals? Is there any one of them that is unfair? This amendment simply provides that *two or more* laboring men who agree to do any one of the acts I have enumerated shall not be held to be guilty of a conspiracy. What is wrong about that? I ask any fair-minded man on earth? In any other case except a case involving a labor dispute one would be laughed out of court if he tried to charge a conspiracy on evidence as to any of the acts enumerated in the provisions I have read. Such a charge would apply nowhere and never has been made, so far as I know, except against men who toil, and as a rule, against men who toil down in the bowels of the earth in the mines.

Senator Bratton asserted:

> The difference is that *the acts enumerated in section four* are perfectly legal.

Senator Norris replied:

> We have declared them to be so, although it ought not to be necessary to do so.[7]

[7] Congressional Record, Volume 75, Part 5, p. 4931.

But the appellees adopt the argument of the Employers Council argue that these substantive rights do not affect territorial law. They concede that the Sherman Act applies to the territory, and that Congress carved these rights from the operation of the Sherman Act as judicially determined by courts and said that they should no longer be held or considered to be violations of any law of the United States, including the Sherman Act.

Of course these rights do not affect state law, except to the extent that they are coextensive with constitutional rights. Congress cannot declare what the public policy of a state is, but it can and did declare what the public policy is in the Territory. Congress did not assume to control monopolies in intra-state commerce, but it did assume to control them in intra-territorial commerce. It would be absurd to assert that what Congress specifically declared legal in an act which applies throughout the Territory can be declared illegal by the Territory. Appellees would certainly not argue that the Territory could legalize the acts made illegal by the Sherman Act, yet where is the difference?

Appellees and the Employers Council urge that since "laws of the territory" are not "laws of the United States," that "laws of the United States" are now "laws of the Territory." But the argument is a non-sequitur. Laws of the Territory have no force and effect outside the Territory. The legislative power of the Territory extends only to rightful subjects of legislation not inconsistent with laws of the

United States, locally applicable. Laws of the United States, however, are laws of the Territory if they are locally applicable to the Territory. The Organic Act of the Territory, or of Puerto Rico or laws passed by Congress for the government of the District of Columbia are obviously not "laws of the United States" in the sense that they can furnish a basis for federal jurisdiction. If such acts were so construed, the delegation of power by Congress to territorial governments would be nullified.

It is amazing to appellants that appellees should use the definition of "person" in the Clayton and Sherman Acts, both of which concededly apply in full scope to the Territory on the anti-trust side, to buttress an argument that Congress did not intend persons and associations in the Territory to have the substantive rights given by the act. "Person" is specifically defined to include corporations and associations under the laws of the Territories. As a matter of fact this very section is set forth in the U. S. Labor Code (29 U.S.C. 53) immediately following the section which creates the substantive rights, as well as in 15 U.S.C. 12 which appellees cite. This clearly indicates that the substantive rights are to be given full effect in the Territory.

Appellants contend that the substantive rights created by the Norris-LaGuardia Act, here relevant, are the rights created by section 2 to engage in concerted activity; the rights created in Section 4, singly or in concert, to give publicity to the existence of, or the facts involved in any labor dispute, whether by

advertising, speaking, patrolling, or by any other method not involving fraud or violence, and to assemble peaceably to act or to organize to act in promotion of their interests in a labor dispute; the right in section 5 to engage in this conduct singly or in concert without having it declared to be a combination or conspiracy; and the right in section 5 not to be held responsible for the unlawful acts of others.

If these substantive rights are in force in the Territory, then the ex parte order, prohibiting as it does engaging in concerted activity in numbers of more than three, is clearly beyond the power of the appellee judge. For the only power he has is to restrain acts of fraud or violence by the persons who committed them.

VIOLATION OF CONSTITUTIONAL RIGHTS

Count Four of appellants' complaint alleges that the appellees by their conduct are depriving appellants of rights guaranteed by the First Amendment since the ex parte order of the appellee judge restrains peaceful picketing, and appellees are being prosecuted for engaging in peaceful conduct.

The issue here is narrow and concise. The area in which we must determine whether a conflict exists with rights guaranteed by the First Amendment is clear, precise and well defined.

The defendant judge at the request of Lihue Plantation Company restrained the International Longshoremen's & Warehousemen's Union (CIO)—a trade Union consisting of thousands of members em-

ployed in the Territory, throughout the continental United States, Puerto Rico and Canada; Local 149 of said Union, which includes the employees of almost all the sugar plantations on the Island of Kauai; Unit 1 of Local 149, which includes the employees of Lihue Plantation Company; the individual officers of Unit 1 of Local 149; and unnumbered John and Mary Does and Roes, "until the further order of this court from *in any way* . . .

> (7) Mass picketing by assembling in compact groups or congregating in crowds on or near real property of the petitioner, whether used for business of residence purposes, to thereby prevent or attempt to prevent or in any manner physically obstruct or *interfere* with ingress to or egress from said real property by petitioner, any of its employees, or any other persons lawfully seeking to enter or leave any of said real property;
>
> AND IN FURTHERANCE HEREOF, you are hereby ordered to limit the number of pickets which you shall use to not more than three (3) pickets in a group at any point and station when stationed at points of ingress to and egress from the petitioner's property, provided, however, that any pickets in excess of three (3) at any one point and station, shall be in motion, and, except when passing each other, shall maintain a distance of not less than ten (10) feet between each other . . .
>
> and all pickets being also enjoined from *otherwise committing* any of the acts hereinbefore prohibited. (R., 41, 45-46.)

The plaintiffs are charged with criminal contempt for violating these specific provisions of the restraining order. Since the Fifth and Sixth Amendments require that defendants be apprised with particularity of the offense with which they are charged the criminal prosecution in the territorial court will be limited to these charges, for conviction on a charge not made would be sheer denial of due process.

It is apparent from a mere reading of the terms of this order that no ascertainable standard of conduct is provided:

1. Thus in any way to mass picket at or near the real property of petitioner whether used for business or residence purposes is proscribed, and this is defined as

> (1) Three pickets at any point and station when stationed at any point of ingress to and egress from petitioner's real property or on or near thereto;
> (2) Points and stations (other than ingress and egress or near thereto presumably) if more than three to be in motion ten feet apart provided that notwithstanding these conditions pickets shall not otherwise commit any of these acts.

2. In any manner assembling in compact groups under the same circumstances as above.

3. In any manner congregating in crowds under the same circumstances as above.

4. In any manner doing any of these acts to prevent or attempt to prevent ingress to and egress from petitioner's property.

5. In any manner interfering with the ingress to or egress from said real property by any persons.

The pickets at their peril were required to determine what comprises points of ingress to and egress from petitioner's real property, whether used for business, residence purposes or at or near thereto. Geographically this covers thousands of acres, numerous company towns, miles of public and company owned roads. They were required to determine whether in any manner any act of theirs otherwise had the effect of accomplishing the prohibited acts. They were required to determine what were points and stations (presumably other than ingress to or egress from or at or near thereto).

Presumably also because of the provision "all pickets being also enjoined from otherwise committing any of the acts prohibited," the foregoing specific prohibitions assume a tentative quality.

It has long been held that the language of an injunction should be so clear and explicit that an unlearned man can understand its meaning without the necessity of employing counsel. *Laurie v. Laurie,* 9 Page 234.

Appellants—none of whom were individual defendants in the injunction suit and most of whom are not employed by Lihue Plantation Company—were charged with violating these provisions of the order only. No fraud or violence is charged.

Appellees deny that the order must be judged on its face to determine whether it is in conflict with rights guaranteed by the First Amendment. Al-

though appellees urge that the order is valid on its face, they also assert that the court can look behind the order to determine the facts.

Appellees and counsel for the employers rely on *Milk Wagon Drivers v. Meadowmoor Dairies,* 312 U.S. 287, 61 S. Ct. 552, 85 L. Ed. 836, to support the right to go behind the face of the amended ex parte order. Both evidently assume from the language of the majority that the findings of fact of the master were not set forth in the decree. It is difficult to determine from the case whether the decree included the findings. But it is obvious from the companion case, decided the same day, *American Federation of Labor v. Swing,* 312 U.S. 321, 61 S. Ct. 568, 85 L. Ed. 855, that the majority and the dissenters were not in disagreement that injunctions are to be judged on their face to determine conflict with the first amendment. At page 308 of the *Meadowmoor* case, Justice Black stated:

> There is every reason why we should look at the injunction as we would a statute, and if upon its face it abridges the constitutional guaranties of freedom of expression, it should be stricken down. . . . The injunction, like a statute, stands as an overhanging threat of future punishment.

And Justice Frankfurter who wrote the opinion of the court in both the *Meadowmoor* and *Swing* cases, said in the later case, "it would be improper to dispose of the case otherwise than on the face of the injunction." In the *Swing* case there were claims of violence and libel.

The rule must be drawn from these two cases, taken together. All the *Meadowmoor* course held was "in the circumstances of the record before us the injunction authorized by the supreme court of Illinois does not transgress its constitutional power." But appellees claim the facts here come within the circumstances of the *Meadowmoor* case. A history of that case discloses that appellees contort the holding of the case.

The Supreme Court of Illinois (371 Ill. 377, 21 N.E. 308) in the *Meadowmoor* case held that the scope of the Illinois anti-injunction Act did not extend to cases where there was no employer-employee relationship and that it had power to restrain picketing where this relationship did not exist. It further held that the right of owners of property to be free from interference by unlawful secondary boycotts could be protected even to the extent of forbidding peaceful picketing and the carrying of signs. While the court in passing mentioned the violence found by the master, its decision was clearly based on the unlawfulness of the secondary boycott in Illinois because it interfered with property rights. The Supreme Court sustained the decision of the Illinois Court on the ground that even peaceful picketing could be restrained when there was a flagrant background of violence or when the picketing had been permeated with violence and held that Illinois could choose to exercise its police power through its courts if it saw fit. On the basis of the Supreme Court's decision in the *Swing* and *Meadowmoor* cases, in

Lawrence Ave. Bldg. Corp., 377 Ill. 37, the Illinois Supreme Court reversed itself in the *Meadowmoor* case, saying that the Supreme Court had held that peaceful picketing was protected by the right of free speech in a secondary boycott. In that case even though there was no employer-employee relationship the court refused an injunction and said it found "no threats of violence to indicate a secondary boycott."

Appellants believe that the *Meadowmoor* case is completely distinguishable on the facts from this case, and that is was carefully distinguished from the question that now confronts this court. That case did not involve an ex parte hearing issued without notice. The lower court after lengthy hearings by a master denied an injunction against any conduct except acts of violence. The time schedule in that case was as follows: The acts of violence alleged extended over a period of three years; picketing began eight months after the alleged acts of violence; it was four years afterwards before the trial judge granted an injunction, limited to violence alone; five years before the Supreme Court of Illinois directed a more stringent injunction against peaceful persuasion, and seven years before the United States Supreme Court sustained the injunction. The injunction was based on a finding of the master that because of the past acts of violence, even peaceful picketing would evoke fear in strangers to the dispute. It is obvious from the majority opinion that but for the long and extended hearings, the findings

of fact, that the same result would not have been reached. Thus the court says:

> Still it is of prime importance that no constitutional freedom, least of all the guarantees of the Bill of Rights, be defeated by insubstantial findings of fact screening reality. That is why this Court has the ultimate power to search the records in the state courts where a claim of constitutionality is effectively made . . .

It is to be recalled that in the *Meadowmoor* case the Supreme Court said that Illinois could choose to exercise its police power through its courts consistent with the Fourteenth Amendment. Congress itself has empowered territorial courts to exercise only the judicial power and has delegated to the legislative the power to legislate on all rightful subjects not inconsistent with the federal constitution and laws. It must be remembered also, that, the Fourteenth Amendment does not transmit to residents of states all the rights guaranteed by the Bill of Rights. The Territory is limited directly by the First Amendment. In the police power under the 14th the test is the reasonableness of its exercise and not the clear and present danger test under the First.

For the reasons stated above we do not think the *Meadowmoor* case affords any support to the position of the appellees.

But it is clear that defendants' whole case rests primarily on the *Meadowmoor* case and that the lower court relied heavily upon that decision. So let us assume for the purposes of argument the

application of the principles laid down in that case to the facts here.

The Supreme Court warned in the *Meadowmoor* case that:

> Still it is of prime importance that no constitutional freedom, least of all the guarantees of the Bill of Rights be defeated by insubstantial finds of fact screening reality.

That legal scholars, Congress and the courts consider affidavit proof and partisan testimony where the right of cross examination is lacking insubstantial and unreliable in labor injunctions cannot at this point be refuted. Thus Justice Frankfurter who wrote the court's opinion in the *Meadowmoor* case in his book, *The Labor Injunction* says:

> In labor cases, however, complicating facts enter. The injunction cannot preserve the so-called status quo; the situation does not remain in equilibrium awaiting judgment upon full knowledge. The suspension of activities affects only the strikers; the employer resumes his efforts to defeat the strike, and resumes them free from the interdicted interferences. Moreover, the suspension of strike activities, even temporarily, may defeat the strike for practical purposes and foredoom its resumption, even if the injunction is later lifted. Choice is not between irreparable damage to one side and compensable damage to the other. The law's conundrum is which side should bear the risk of unavoidable irreparable damage. Improvident denial of the injunction may be irreparable to the complainant; improvident issue of the injunction may be irreparable to the de-

> fendant. For this situation the ordinary mechanics of the provisional injunction proceedings are plainly inadequate. Judicial error is too costly to either side of a labor dispute to permit perfunctory determination of the crucial issues; even in the first instance, it must be searching. The necessity of finding the facts quickly from sources vague, embittered and partisan, colored at the start by the passionate intensities of a labor controversy, calls at best for rare judicial qualities. It becomes an impossible assignment when judges rely solely upon the complaint and the affidavits of interested or professional witnesses, untested by the safeguards of common law trials—personal appearance of witnesses, confrontation and cross-examination.

And again Justice Frankfurter, after pointing out the fact that most judges in the heyday of the hated labor injunction followed the general rule that picketing per se is an admission of violence, said further:

> Other courts, contrariwise, have held fast to general agency principles and have exacted the full quantum of proof normally required to establish the responsibility of one person for the acts of another. They have insisted that the affidavits prove the union to be chargeable with the acts complained of, as a condition precedent to the inclusion of the union within the restraint of the injunction. As one New York judge rhetorically asks: "Is it the law that a presumption of guilt attaches to a labor union association?" To expect such a mode of hearing to elicit the truth about these ambiguous acts and motives of men is to look for miracles. To ask such a

> system of procedure to work without serious friction and without arousing wide scepticism regarding law's fair-dealing is to subject the legal order to undue stress and strain. The chancellors of the fourteenth and fifteenth centuries pursued more rational methods of eliciting truth . . .
>
> This ancient wisdom has been forgotten in the most sensitive contact between law and feeling. To quote Judge Amidon again ". . . affidavits are an untrustworthy guide for judicial action . . . it it peculiarly true of litigation growing out of a strike, where feelings on both sides are necessarily wrought up, and the desire for victory is likely to obscure nice moral questions and poison the minds of men by prejudice . . . Experience . . . has caused me to be so incredulous of affidavits that I have required in all important matters the presence of the chief witnesses upon each side at the hearing. These witnesses have been subjected to oral examination. The court has had a chance to observe their demeanor. A comparison of the picture produced by their testimony with that produced by their affidavits has proven the utter untrustworthiness of affidavits. Such documents are packed with falsehoods, or with half-truths, which in such a matter are more deceptive than deliberate falsehoods."

Appellants submit there can be nothing but insubstantial findings of fact screening reality in ex parte hearings, and that when a judge assume to go beyond restraining acts of violence alleged by an employer to have occurred and restrains even peace-

ful activity, he has exceeded his power and made a mockery of the Bill of Rights.

But the court in the *Meadowmoor* case did not stop with the warning against insubstantial proofs. The court pointed out that the master found, and the Illinois Supreme Court rested its decision on a finding that because of the past violence of bombings and windowsmashing, third persons would be intimidated because . . .

> The momentum of fear generated by past violence would survive even though future picketing might be wholly peaceful. So the Supreme Court of Illinois found. We cannot say that such a finding so contradicts our own experience to warrant our rejection.

The Court here referred to violence which included window smashing, bombing and burning of stores and physical violence extending over a period of four years.

Appellees urge this court that acts committed a day or so before an ex parte hearing justify a restraint against peaceful activity on the part of all sugar workers on the Island of Kauai and all other workers belonging to the same union, the International Union and all activity on, at or near the thousands of acres of the employers' property or the 20 company towns in which the employers live.

The New York courts have interpreted the New York anti-injunction act and this case to mean there must be a finding of the court that peaceful picketing in the future will be impossible before peaceful picketing or assembly can be restrained.

The appellees and the lower court also relied upon *Allen Bradley v. Local Board,* 315 U. S. 750, as condemning mass picketing. That case involved a statutory injunction entered by a Wisconsin court at the request of the State Labor Relations Board which had conducted lengthy hearings. In the words of the United States Supreme Court: "The sole question presented by this case is whether an order of the Wisconsin Employment Peace Act is repugnant to the provisions of the National Labor Relations Board." No constitutional questions were presented or argued and the Clayton and Norris-LaGuardia Acts were not involved.

The Supreme Court, in *Winters v. New York,* 92 L. ed. Advance Sheets 654, at page 660, restates the test that must be made of enactments which touch on the rights guaranteed by the First Amendment:

> When a legislative body concludes that the mores of the community call for an extension of the impermissible limits, an enactment aimed at the evil is plainly within its power, if it does not transgress the boundaries fixed by the Constitution for freedom of expression. The standards of certainty in statutes punishing for offenses is higher than in those depending primarily upon civil sanction for enforcement. The crime "must be defined with appropriate definiteness." Cantwell v. Connecticut, 310 US 296, 84 L ed 1213, 60 S Ct 900, 128 ALR 1352; Pierce v. United States, 314 US 306, 311, 86 L ed 226, 230, 62 S Ct 237. There must be ascertainable standards of guilt. Men of common intelligence cannot be required to guess at the

> meaning of the enactment. The vagueness may be from uncertainty in regard to persons within the scope of the act, Lanzetta v. New Jersey, 306 US 451, 83 L ed 888, 59 S Ct 618, or in regard to the applicable tests to ascertain guilt.

The court cites with approval the language of the New Mexico Supreme Court in *State v. Diamond,* in 27 NM 477, 202 P 988, that where the statute uses words of no determinative meaning, or the language is so general and indefinite as to embrace not only acts commonly recognized as reprehensible, but also others which it is unreasonable to presume were intended to be made criminal, it will be declared void for uncertainty.

It is apparent that the *ex parte* amended restraining order is an order designed to break a strike. We are not concerned here with narrow city streets and crowded industrial area, but with an agricultural strike involving large areas and large numbers of employees. Let us assume, for example, that an employer having procured an order limiting picketing to three persons, sets into operation what the LaFollette Civil Liberties Committee described as a Mohawk Valley Plan whereby every means of communication and public pressure is used against employees to defeat their morale, and to assure them that the strike is broken. Under such circumstances, picketing is the only means which the employee has to communicate his faith in collective action.

It is true that there is a coercive effect to large numbers of pickets, particularly in company towns,

but the coercive quality is a quality of moral coercion, a fear of being ostracized by one's friends and neighbors. It is obvious that if a circuit court of the Territory has the power on mere *ex parte* representation by an employer to so narrowly limit the right to picket, then an invincible sword has been forged by the court to strike to the heart every labor organization in the Territory.

Even under the Fourteenth Amendment, where states, it is said, may exercise their police power through the judicial arm, the test of reasonableness must apply.

Even assuming for the argument under this count of appellants' complaint that a circuit court may limit the numbers of pickets, surely that limitation must be reasonable in the light of the facts and circumstances, and surely the order must be couched in language so that men of common understanding can understand and interpret its meaning.

Appellants respectfully submit that the amended temporary restraining order and the information under it which charges no act of fraud or violence violates appellants' rights of free speech, and is void because it is vague and ambiguous and includes within its scope lawful as well as unlawful conduct.

POWER OF TERRITORY TO PUNISH FOR CONTEMPT OF A VOID ORDER

The Attorney General urges that the Territory has the power to punish as criminal contempt violations of an order issued without jurisdiction or ex-

ceeding the jurisdiction of the appellee judge, or even if the order is in violation of the rights guaranteed by the First Amendment. In the *Meadowmoor* case, so heavily relied upon by appellees, the majority of the court said that even if an appropriate injunction were put to abnormal uses so that encroachments were made on free discussion outside of the limits of violence, the doors of the Supreme Court are always open.

The *Lewis* case, on which appellees relied, is not decided on the basis of Constitutional rights, nor is the holding of the court a reliable one as a guide for such a serious contention. It will be recalled that four justices found that the Norris-LaGuardia Act did not restrict the jurisdiction of federal courts when an injunction was applied for by the Government of the United States. Justice Frankfurter, who disagreed with this holding, concurred in the upholding of the contempt charge since he felt that the order of the federal court should have been obeyed pending appeal. A majority of the court did not need to sustain the court's jurisdiction on the ground that a federal court had a right to punish regardless of the validity of the order under federal rights. The question of contempt of an order which violates the First Amendment was not considered by the court. If this is indeed to be taken as the authoritative holding of the Supreme Court, then the Civil Rights Act has been stricken from the books.

We have arrived back at the point which Senator

Norris described in the Senate Judiciary Committee on the Norris-LaGuardia Act:

> There can be no question, therefore, that there has been created, as a result of writing law into injunction orders and then enforcing those orders by the same judge who wrote them without a grant of trial by jury, that condition of uniting the two powers of making and enforcing laws in one person or one body of men wherein, using the language of Blackstone, "there can be no public liberty."
>
> It is difficult to see how any civilized people could indefinitely submit to such tyrannical procedure. It is not difficult to understand how such cruel laws, made not by any legislature but by a judge upon the bench, should bring our Federal courts into disrepute. Neither is it difficult to see how such injunctions, violating the conscience of civilization, should frighten persons against whom such injunctions are issued into desperation. What free American citizen is willing to submit to the violation of his sacred rights of human liberty and freedom?

Respectfully submitted,

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